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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

Misc. No. 222

ESTHER J. MICHEL (as representing Albert P. Michel, deceased, and in her own behalf),
Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, UNIVERSITY OF CALIFORNIA, and STATE COMPENSATION INSURANCE FUND,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Petitioner has asked this Court to review an order of the California Industrial Accident Commission denying workmen's compensation benefits for the last illness and death of her husband.

The order was based on a finding that the evidence did not establish that petitioner's husband sustained any injury arising out of and in the course of his employment, and that it did not establish that his death was caused by any injury arising out of and in the course of his employment.

JURISDICTION.

The order of the California Supreme Court denying Mrs. Michel's petition for a rehearing was made and entered June 26, 1957.

The jurisdiction of this Court is invoked under 28 U.S.C., sec. 1257 (3).

It is obvious that petitioner has failed to comply in numerous respects with the statutes and the rules of this Court pertaining to a petition for a writ of certiorari. Petitioner has failed to file the certified record of the court whose decree is sought to be reviewed within the 90 day jurisdictional period. Therefore, it appears that petitioner's application for a writ of certiorari is out of time and should be denied for that reason alone.

THE FACTS.

On June 20, 1949, while petitioner's husband was alive, he filed an application for workmen's compensation benefits against the University of California, claiming that he had become disabled by "injurious

radiation from radio-active materials." As the "date of injury" he designated "between January 1944 and May 1945."

A hearing was held in the employee's home on August 26, 1949. The referee who presided at this hearing issued an order taking the case off calendar pursuant to the consent of the parties. The referee's report observed, "The applicant apparently had some difficulty in marshalling his medical evidence . . ." The order and report were filed and served on the parties on November 3, 1949.

Two days later, on November 5, 1949, the employee died.

More than six years later, on December 6, 1955, his widow filed a claim. This did not specify whether it was for a death benefit or for compensation or medical expense which might have been due to the husband.

A death certificate was introduced in evidence. In the space headed "Disease or Condition Directly Leading to Death" was entered "Aplastic anemia, chronic." In the next space, headed "Due To" was entered "Unknown cause".

Dr. Edward A. Baker, on behalf of widow, testified. His testimony was summarized by the referee as follows:

> "That his specialty is internal medicine. He has passed the first examination for the Board.
>
> "He examined the deceased. It was only from the history that the decedent gave him that wit-

ness was able to tell that decedent was in contact with radioactivity. The only way a person would know generally that he was exposed to radioactivity would be that he would wear a badge. The only showing of exposure to radioactivity in decedent's case was the history and kind of disease he had. Witness noted that the deceased has been employed at Oakridge and that would be a logical place to determine whether there was an exposure to radioactivity and it would be logical to assume that there was such exposure in the light of decedent's disease. The latter died from a fibrosis replacement of the bone marrow, the red cells not being formed. Exposure to X-rays could have created this disease. In the majority of cases, this condition is considered to be of a toxic nature. Another cause is tumors, which was ruled out in this case. Another cause would be liver disfunction which did not exist in this case. A common toxin is benzine; another is arsenic; another, phosphorus. There are not many reportable cases of the instant kind. Witness couldn't give an opinion as to whether the deceased was exposed to radioactivity from the University of California. It was his impression that the deceased didn't know whether there was exposure there. The diagnosis in the instant case is consistent with the history of exposure to radioactivity. The time formation is the most important factor in this kind of case. Witness believes that the disease had its onset before 1948 and considering an exposure at Oak Ridge, the time sequence, that is, the development of symptoms three years from such exposure, would indicate that the disease was caused by such. Where there is a manifestation of the disease from a year and

a half to two and a half years after exposure, it is pretty likely that the disease was caused by the exposure. When the decedent was first seen by the witness, the former was chronically ill and had been for some time. When he left the University of California, the decedent had evidence of a mild anemia. This is what witness based some of his conclusions on. It was witness' opinion that the anemia began in 1945.

"Witness read from the report contained in a letter from Oak Ridge and which is part of the medical file in basing his opinion that decedent was exposed to radioactivity."

The referee held that the widow's claim was barred, citing *Labor Code*, Section 5406 and *Ruiz v. Ind. Acc. Com.* (1955), 45 Cal. 2d 409.

The widow filed a Petition for Reconsideration, which the Commission granted.

At a hearing held after reconsideration had been granted, Wilfred S. Bigelow, personnel manager of the radiation laboratory of the University of California, testified. The referee summarized his testimony as follows:

"*Wilfred S. Bigelow*, called by the defendants, testified that he has been personnel manager of the radiation laboratory of the University of California since June 1942, and that Albert Michel was employed from January 10, 1944 to May 11, 1945 as a mechanic. He worked with a group of mechanics doing re-assembly work. He was not classifiable as a machinist and was considered a mechanic because he assembled parts of mechanical equipment only.

"Witness was at Oak Ridge, Tennessee between October 1944 and December 1944. The decedent worked in Alpha No. 2 Group there with a group of mechanics.

"On his place for prior employment on his application, the decedent gave Richmond Shipyard as his next prior place of employment and his occupation there as welder and gave as his reason for leaving as his health and mentioned the weather. There was also a record of him having previously worked for a long period of approximately thirty years at the General Electric Company plant at Erie, Pennsylvania."

Burton J. Moyer also testified. His testimony was summarized as follows:

"*Burton J. Moyer,* called by defendants, was sworn and testified that he is a physics professor in the Physics Department of the University of California, and also health physicist at the Radiation Laboratory. He is a doctor of philosophy, obtaining that degree in 1939 in physics.

"He was a physicist at the radiation laboratory at Oak Ridge in the latter part of 1944 and in 1945 up to August, at which time the decedent worked there. It was a portion of the Alpha Two operations Research Group. They were engaged in separating isotopes of uranium, and the witness had with him a sample of pure uranium of about the size of one cubic inch.

"He said that the decedent did not handle any dangerous compounds of uranium containing gamma or x-rays and had no exposure considered dangerous. He had no contact with machinery that had been blown apart or that had been ex-

posed to radiation. He said that the testimony of applicant regarding the machines having been blown apart was a misconception and that the process was a slow electrical or magnetic process.

"Also in the same group was Dr. Frank Oppenheimer and Dr. Victor Anderson. There was no nuclear reaction involved in the decedent's work.

"Cross-examined, he said he was in the same group as the decedent but did not work with him. However, witness said he did do assembly work on occasions and saw the decedent frequently but not constantly.

"He denied that the applicant worked in any process of blowing up machines or handled blown-up machines, but said he took machines apart and re-assembled them.

"He was not always on the same shift as the decedent.

"He is well acquainted with a book referred to by applicant's representative entitled 'Peaceful Uses of Atomic Energy.' Applicant's representative read a paragraph from page 579 of said work and the witness said he would not dispute the contents thereof as general statements. He is also acquainted with a work entitled, 'Acute Radiation Syndrome,' and uses it as a reference. He is not familiar with a book entitled 'Hiroshima Diary.' He is slightly familiar with the report of the Los Alamos laboratory on 'Effects of Atomic Weapons.' He does not recall having read the reports of the British and United States Societies dated June 12, 1956.

"He does not recall seeing the decedent after he left the University of California employment.

"They did not use a material known as strontium at the Oak Ridge Group.

"There were certain minor safety rules in effect at the time of decedent's employment but not the rigid safety rules which are now in effect, but which cover a completely different situation."

On January 17, 1957, two Commissioners of Panel One of the Industrial Accident Commission signed an order denying benefits. The order was based on findings that the evidence did not establish that the decedent had sustained any injury arising out of the employment.

Petitioner filed a petition asking that the Commission make a finding as to the cause of death and for a further hearing to prove that the decedent had been furnished treatment by the University, as distinguished from the State Compensation Insurance Fund.

This petition was denied. Petitioner then filed the Petition for Review by the State District Court of Appeal and the State Supreme Court, both of which were denied.

THE POSITION OF RESPONDENT COMMISSION.

It is the position of the respondent Commission that the testimony of the witnesses Bigelow and Moyer, summarized above, supports the finding that the decedent did not sustain any injury arising out of his employment.

It is true that if the opinion of Dr. Baker could be accepted as correct, it would support a contrary finding. However, Dr. Baker's knowledge of the working conditions was obtained from the employee. If this was faulty, as it was shown to be by the testimony of the employee's superiors, Dr. Baker's opinion, of course, must fall.

Winthrop v. Ind. Acc. Com. (1931), 213 Cal. 351, 355.

It is respectfully submitted that the findings of the Commission and its consequent order denying benefits are supported by the evidence, that there was no lack of due process of law, and that the petition for writ of certiorari should be denied.

Dated, San Francisco, California,
October 23, 1957.

Respectfully submitted,
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DANIEL C. MURPHY,
Of Counsel.